No. 77-968

In the Supreme Court of the United States

OCTOBER TERM, 1978

DETROIT EDISON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 560 F. 2d 722. The decision and order of the National Labor Relations Board (Pet. App. 14a-59a) are reported at 218 NLRB 1024.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1977, and petitions for rehearing and rehearing *en banc* were denied on November 22, 1977 (Pet. 2; Pet. App. 13a). The petition for a writ of certiorari was filed on January 4, 1978, and was

granted on March 27, 1978 (A. 450).[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board reasonably exercised its remedial authority in ordering the employer to furnish to the union representing its employees copies of tests used by the employer in the selection of applicants for jobs and the employees' test papers and scores, where such information is relevant to the processing of employee grievances and the Board's order includes protective provisions to maintain test security.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8. (a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Sec. 10.
>
> * * * * *

[1] "A." refers to the separate appendix to the briefs.

> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in * * * any such unfair labor practice, then the Board * * * shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

STATEMENT

1. Since April 1971, petitioner Company has been party to collective bargaining agreements with Local 223 of the Utility Workers Union of America, AFL-CIO (the Union), covering the operating and maintenance employees in the production department of the Company's Monroe power plant (Pet. App. 19a-20a). The agreement in effect during the period relevant to this case included the following provision:

> Section 13. *Promotions.* In promotion of employees covered by this Agreement to classifications within the same bargaining unit, seniority will govern whenever reasonable qualifications and abilities of the employees being considered are not significantly different. "Significant difference" shall be "head and shoulders difference," and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences. * * * [A. 116.][2]

[2] See also Section 38 (A. 117-118).

In late 1971, the Company began the process of filling six bargaining unit positions known as "Instrument Man B" jobs.[3] The posted requirements for these jobs were: satisfactory high school credits for two years of math and one year of science, a satisfactory physical examination, a minimum of "recommended" on the instrument man aptitude tests selected by the Company,[4] and a satisfactory attendance

[3] An instrument man "installs, maintains, repairs, calibrates, tests and adjusts precision instruments in the power plants" (A. 358).

[4] In 1958, the Company's industrial psychologists, after studying the Instrument Man job, hypothesized that certain cognitive abilities were required for the job and selected three tests which they felt would measure those abilities. The tests selected were: (1) the Wonderlic Personnel Test, which measures "general mental ability"; (2) six ability tests for "high school students entering engineering training" from Part IV of the Engineering and Physical Sciences Aptitude Test (EPSAT); and (3) the Minnesota Paper Form Board (MPFB) test, which measures the ability to visualize "how part of a diagram would fit together to make a complete diagram." (A. 188-189, 368.) Incumbent instrument men were given the tests (collectively called a "test battery") on an experimental basis, and were independently ranked by their supervisors in terms of their ability to do the various job functions of the instrument man job. A positive correlation between demonstrated ability to perform the instrument man job and higher scores on the test battery was shown to exist. (A. 190.)

In 1970, due to complaints from engineers in the plant that "some of the men that had met the 'acceptable' standard on the original instrument man battery were not working out very well on the job" (A. 232), the Company's psychologists restudied the test battery and decided to eliminate the Wonderlic test because "it was found that this test was adding to the predictive value of the battery only at the low end of

record (Pet. App. 20a). Ten Monroe unit employees bid for the instrument man jobs, but all were rejected for failure to achieve the minimum score of 10.3 set by the Company (Pet. App. 20a-21a).[5] The jobs were then filled by applicants from outside the Monroe unit (Pet. App. 21a).

In January 1972, the Union filed a grievance under the collective bargaining agreement, protesting

scores" (A. 347). The correlation coefficient between the remaining tests and supervisory ratings was determined to be .71 (as compared with .73, using the three tests) (*ibid.*). (If the relationship between two variables were positive and perfect, the correlation coefficient would be 1.0—that is, the same line would express the increases and decreases in both variables. On the other hand, a correlation coefficient of .0 would mean that no linear relationship exists. (A. 236-238.)

About a year later, the Company commissioned the National Compliance Company (NCC) "to inquire into the validity of the Instrument Man battery * * *" (A. 238, 354, 358). Using a sample of 35 incumbent instrument men who had taken the tests (the former three-test battery) and for whom supervisory ratings had been secured, NCC arrived at a correlation coefficient of .338 between the test scores and the Company's 1970 supervisory ratings (A. 364, 366). Despite the fact that the .338 correlation coefficient was substantially lower than that obtained in the 1970 study, the NCC concluded that it was still statistically significant, *i.e.*, the "test battery appears to be effectively selecting men who will perform better as Instrument Men" (A. 367).

[5] The actual test scores on the MPFB could range from 0 to 64, while the weighted scores could range from 2.61 to 6.62; the actual EPSAT scores could range from 0 to 155, while the weighted scores could range from 1.43 to 8.65. The battery score was obtained by adding the weighted scores on the two tests. The Company determined that a battery score of at least 10.3 was necessary to receive further consideration for the instrument man position. (A. 129-131.)

the rejection of the Monroe unit applicants on the ground that the testing procedure was unfair (Pet. App. 21a; A. 120). The grievance was rejected by the Company at all levels, and the Union took it to arbitration (Pet. App. 21a).

In preparation for the arbitration proceeding, the Union requested the Company to supply it with copies of the test battery, the applicants' test papers, and their scores. The Company refused, although it did furnish the Union with copies of reports validating the tests; sample test questions similar, but not identical, to those in the actual test battery; and the actual scores without identification of the employees (Pet. App. 30a-31a, 66a). The Union asked the arbitrator to order production of the requested materials, but he declined on the ground that he did not believe he had the authority to do so (Pet. App. 31a-32a, 34a). The parties agreed to proceed with the arbitration without the requested materials, subject to the right of the Union to reopen the case if the Company were subsequently ordered by a court to provide them (Pet. App. 67a-68a). In December 1973, the arbitrator issued his decision, finding that the test battery was properly validated (Pet. App. 73a), but that the 10.3 cut-off score was too high in that it eliminated from consideration applicants whose test scores were not so far below the cutoff score as to make it improbable that they would succeed in the job (Pet. App. 74a-75a). Accordingly, he ordered the Company to reconsider three of the rejected Monroe

unit applicants who had scored between 9.3 and 10.3 on the test battery (Pet. App. 75a).[6]

2. Upon a charge filed by the Union, a complaint was issued against the Company, alleging that it had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to provide the requested information (Pet. App. 18a-19a). Following a hearing, the Board's Administrative Law Judge sustained the allegations of the complaint, finding that the Company had failed and refused "to honor the Union's demand for certain information relevant and reasonably necessary to the processing of employee grievances" (Pet. App. 55a). He recommended that the Company be ordered (Pet. App. 55a-56a):

> to supply copies of the battery of tests administered to the employee applicants for the position of Instrument Man B in this proceeding, including the actual test papers of the applicants (necessary to check the accuracy of the scoring of the tests), only to a qualified psychologist selected by the Union to act in its behalf * * *. The psychologist shall be free to fully advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or other-

[6] Subsequently, one of the three was promoted to an instrument man job (Pet. App. 39a).

> wise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding, or if no request is made to reopen the arbitration hearing within 90 days after the psychologist receives the battery of tests, all copies of the battery of tests shall be returned to [the Company].[7]

The administrative judge also recommended that the test scores of each applicant, linked to the applicant's name, be provided directly to the Union (Pet. App. 56a).[8]

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[7] The administrative judge stated that he was recommending that the materials be supplied not directly to the Union, but to a psychologist hired by it, because:

> mere disclosure of the tests to lay Union representatives is not likely to be productive of constructive results. If the tests are to be properly analyzed, this should be done by those who have the expertise to deal with the concept involved. * * * [I]n some cases, as this, the technology of the efficiency experts may outrun the ability of the individual to cope. The individual then needs an expert of his own. However, this does not affect the right of the employee, through his representative, to be informed, but may determine the manner or form [in] which the information is submitted. [Pet. App. 54a.]

[8] The administrative judge found that the Company "has produced no probative evidence that the employees' sensitivities are likely to be abused by disclosure of the scores" (Pet. App. 53a). Moreover, the administrative judge found that, to require the Union to secure the consent of the individuals concerned, as the Company contended, would impair the

The Company excepted to the latter recommendation, but not to the former. It specifically requested the Board "to adopt that part of the order which requires that tests be turned over to a qualified psychologist selected by the Union," including the provision that such submission be done in accord with the limitations spelled out by the Judge. (Pet. App. 2a.)

The Board adopted the administrative judge's findings and recommendations, except that it "would not condition the Union's access to the information on the retention of a psychologist but rather would have [the Company] submit the information directly to the Union and let the Union decide whether the assistance or expertise of a psychologist is required" (Pet. App. 15a).[10] The Board recognized the interest in maintaining security of the tests and therefore, "in order to preserve their future utility," imposed "the same restrictions upon their use by the Union as recommended by the Administrative Law Judge" (Pet. App. 16a).

"Union's obligation * * * to represent the unit of employees as a whole," by securing "information relevant and reasonably necessary to the enforcement of the collective-bargaining agreement which exists for the benefit of all" (Pet. App. 56a).

[9] The exceptions are not printed in the Appendix. We have therefore lodged with the Clerk a copy of the Union's exceptions, the Company's exceptions, and an "Answering Brief" filed by the Company in response to the Union's exceptions.

[10] Member Kennedy would have adopted the administrative judge's recommended order (Pet. App. 17a).

3. A divided court of appeals [11] enforced the Board's order, noting that the Company "did not except to the [Administrative Law Judge's] finding that it had engaged in an unfair labor practice by refusing the union's request for the test materials" (Pet. App. 2a), and did not contest "the finding that the tests, answer sheets and scores are relevant" (Pet. App. 5a). The court rejected the Company's contention that the Board erred in ordering that the battery of tests be provided directly to the Union, concluding that the "answer to [the Company's] concern about the possibility of the tests falling into unauthorized hands is found in the Board's adoption of the administrative law judge's limitations on use of the materials by the union. The restrictions on use of the materials and obligation to return them to [the Company] are part of the decision and order which we enforce. Violation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board." (Pet. App. 6a-7a.)

The court also rejected the Company's contention that it would be a breach of confidentiality to give the Union test scores linked to the names of employees taking the test because the "requirement that the bargaining representative be furnished with relevant in-

[11] Judge Weick dissented (Pet. App. 8a-12a) on the ground that turning over the test papers to the Union would destroy the future value of the tests, would breach the confidentiality privilege of the applicants, and would subject the psychologists who administered the tests to disciplinary action.

formation necessary to carry out its duties overcomes any claim of confidentiality in the absence of a showing of great likelihood of harm flowing from the disclosure" (Pet. App. 7a). Finally, the court rejected the Company's contention that direct disclosure of the test battery and the linked test scores "would involve [the Company's] industrial psychologists in a breach of their professional ethical code." The "professional code of the American Psychological Association can[not] stand as a barrier to the right of a duly chosen and certified collective bargaining representative to receive information of use to it in carrying out its duties and responsibilities. The Board showed its consideration for the expressed concerns of the company and the [American Psychological Association] by adopting the limitations on use of the material recommended by the administrative law judge." (Pet. App. 8a.)

SUMMARY OF ARGUMENT

I.

The Administrative Law Judge, whose findings were adopted by the Board, found that the test battery, the test papers, and the test scores linked with employee names were relevant to the Union's processing of employee grievances respecting the instrument man job, and that the Company violated the duty to bargain imposed by the Act by denying the Union's request for such information. See *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432.

Insofar as the Company questions the relevancy of the test battery and the test papers, that challenge is foreclosed because of the Company's failure to file exceptions to the administrative judge's findings with the Board.

In any event, the Board properly concluded that the materials sought by the Union were relevant to the processing of the pending grievances. The Union was not attacking the validity of the tests, but was attempting to show that, even assuming there was a high statistical probability that those applicants who did well on the tests would do well in the instrument man job, certain applicants, though they did poorly on the tests, nonetheless had the ability to perform the job. Indeed, petitioner admits that there is a 20 percent probability that a low scorer on the test would still be qualified for the job.

The test battery and the test papers and scores would enable the Union to determine the extent to which questions were asked which called for knowledge beyond the requirements of the instrument man job, and whether particular applicants received low scores solely because they failed to answer such questions correctly. Finally, the Union needed to link the employees' names with their test scores, not only to verify the accuracy of the scores, but to determine whether a particular employee was entitled to be considered for the job despite a low score.

II.

The Board was not unreasonable in ordering that the test materials be given directly to the Union, rather than to a Union-hired psychologist, as the administrative judge had directed. Since the Union was not challenging the validity of the tests but merely attempting to show that they were "unfair" to particular applicants, the services of a professional psychologist were not necessarily required. To force the Union to incur this substantial added expense where it would not contribute to the intelligent processing of the grievance, could well deter the Union from processing some grievances which it believed to be meritorious.

The Board's order, as enforced by the court of appeals, does not ignore the Company's interest in maintaining test security. It directs the Union "not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions" to past and future test-takers "or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests"; and, at the conclusion of the arbitration proceeding, the Union is directed to return all materials to the Company (Pet. App. 55a-56a). The order is similar to the kinds of protective orders fashioned by courts in ordering disclosure of sensitive information under the federal discovery rules.

Petitioner's contention that disclosure of the test materials to the Union would destroy the future validity of the tests rests upon the assumption that the

Union is likely to violate the Board's order as enforced by the court. However, the Union cannot be presumed to be predisposed to act in an unlawful manner. *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667. Moreover, the Union has ample reasons, apart from legal sanctions, to maintain test security, since its primary concern is to effectively represent the employees; violation of test security would adversely affect its relationship with the Company and could damage its standing and credibility with the employees. While there is always a possibility that a protective order may be breached, the Board weighed that minimal risk against the employee interests served by direct disclosure to the Union and properly concluded that the latter were entitled to prevail.

Even though only the Board may institute contempt proceedings, there is no reason to believe that it would fail to do so if it learned that the Union had violated the restrictions imposed by the Board and the court. Besides the other reasons the Union has for not misusing the test materials, the prospect of the substantial fine which could be imposed as part of a remedy for contempt of the court's order would be likely to deter the Union from such misuse.

III.

There is no merit in petitioner's contention that it should not be required to disclose the scores made by specific applicants because it promised the applicants that the scores would be kept confidential. The Union cannot be deprived of information which is relevant

to the discharge of its responsibility to represent fairly all of the unit employees merely because the Company has unilaterally decided to assure employees that the information would be kept confidential. See *General Electric Co.* v. *National Labor Relations Board*, 466 F. 2d 1177, 1185 (C.A. 6). Nor can the Company condition the release of such information upon the Union's obtaining the consent of the employees involved. See *Boston Herald-Traveler Corp.*, 110 NLRB 2097, 2100, enforced, 223 F. 2d 58 (C.A. 1). The Company produced no probative evidence that disclosure of employee names and test scores would impose a "clear and present danger" of harassment and violence (*United Aircraft Corp.* v. *National Labor Relations Board*, 434 F. 2d 1198, 1207 (C.A. 2), certiorari denied, 401 U.S. 993); indeed, it did not even show that any employee test-taker objected to disclosure of his test score.

Contrary to the contention of the American Psychological Association, the psychologist-client counselling relationship is not jeopardized by disclosure of employee names and test scores, since the test-taking here involved no such relationship. It is not at all clear that the Board's order is inconsistent with any of the Association's Ethical Standards. But, in any event, the Board's order enforcing federal statutory rights would take precedence over the Ethical Standards and any state law incorporating them. See *National Society of Professional Engineers* v. *United States*, No. 76-1767, decided April 25, 1978; *Nash* v. *Florida Industrial Commission*, 389 U.S. 235.

ARGUMENT

THE BOARD REASONABLY EXERCISED ITS AUTHORITY TO REMEDY UNFAIR LABOR PRACTICES IN ORDERING THE COMPANY TO FURNISH DIRECTLY TO THE UNION THE TEST BATTERY AND ACTUAL TEST PAPERS AND SCORES OF EMPLOYEE JOB APPLICANTS IN CONNECTION WITH THE PROCESSING OF EMPLOYEE GRIEVANCES CONCERNING USE OF THE TEST

A. The test materials requested by the Union were relevant to the employee grievances

In *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, this Court held that it is a violation of the duty to bargain imposed by Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), for an employer to deny a bargaining representative information that is potentially relevant and useful to the representative in processing grievances under a contractually established grievance procedure. The duty to furnish such information was said to be governed by a "discovery-type standard" (385 U.S. at 437). Here, the administrative law judge, applying that standard, concluded that the information requested by the Union—the test battery and the actual test papers and scores of employee applicants for the instrument man jobs—was relevant. Petitioner now challenges that finding (Pet. Br. 43-54).

1. The short answer is that the argument comes too late. Before the Board, the Company did not except to the administrative judge's findings or recommendations with respect to the test battery and the test

papers of the applicants, but instead urged the Board to adopt that part of the order which required the tests to be turned over to a psychologist selected by the Union. It merely excepted to the administrative judge's recommendation that the scores of each applicant, linked to the applicant's name, be reported to the Union (*supra*, p. 9). In normal course, this would foreclose judicial review of the question of relevance.[12]

Petitioner seeks to avoid this consequence by arguing that it had "no practical reason" to challenge the administrative judge's order because it had earlier offered voluntarily to do most of what was ordered in an effort "to appease" the Union (Pet. Br. 48). We do not follow that argument. The Union filed exceptions to the recommended order insofar as it limited disclosure to a designated psychologist and the Company excepted to the order insofar as it required disclosure directly to the Union of test scores linked to the names of the applicants. Thus, petitioner was well aware that the administrative judge's decision as a whole was subject to re-examination by the Board. Unless it wished to adhere to its offer, the Company

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[12] Section 10(e) of the Act, 29 U.S.C. 160(e), states that where an objection "has not been urged before the Board * * *. [it] shall [not] be considered by the court." The Board's Rules and Regulations, 29 C.F.R. 102.46(b), provide that "any exception to a ruling, finding, conclusion, or recommendation [of the Administrative Law Judge] which is not specifically urged [before the Board] shall be deemed to have been waived." See *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322.

should have raised the relevancy issue. Having failed to do so, it could not challenge the matter for the first time in the court proceedings. Indeed, the court of appeals states (Pet. App. 5a) that petitioner did not "actually contest[] the finding that the tests, answer sheets and scores are relevant" even in that forum. The attempt to do so here is untimely.

2. In any event, the Board properly concluded that the materials sought by the Union were relevant to the processing of the pending grievances. This is clear when the nature of the inquiry is stated. The Union was not suggesting that it was improper to use tests. Nor was it challenging the general utility (or "validity") of the particular tests administered by the Company. Rather, the Union's position was that, assuming a high statistical probability that those applicants who did well on the tests would do well in the instrument man job, the tests were nonetheless "unfair" to certain applicants who, though they did poorly on the tests, had the ability to perform the job.[13]

[13] As the administrative judge noted (Pet. App. 47a):

> The statistics may, indeed, tend to show that the tests are valid to serve *the employer's purpose*: i.e., they may serve to identify those employees likely to do well on the job. However, the statistics do not serve to inform the employees, or their representative, whether the tests are truly job related or contain objectionable distortions (it is admitted that "valid" and "job related" are not co-extensive), whether they have built-in bias and are, in fact, discriminatory, or whether, in sum, they tend to undercut [the employer's] contract commitment to promote by seniority where there is no "significant difference" between the "reasonable qualifications and abilities" of the applicants for promotion. [Citation omitted.]

The arbitrator's holding that disclosure of the actual test battery to the Union would "prove nothing" and that the Union's position in the arbitration case was not "damaged in any way by lack of access to the test" (Pet. App. 72a) was premised on the erroneous view that the Union only wanted to prove the invalidity of the test battery. Moreover, while the arbitrator ruled that he had no authority to compel production of the material sought by the Union, he reserved the right of the Union to reopen the arbitration case if it obtained the materials through court order (Pet. App. 34a).

In sum, the Union was questioning whether the tests, in practice, screened out eligible applicants. At the end of the day, it might be found that, although generally accurate, the tests ought to be amended in certain particulars, or that certain failing applicants should be reconsidered by applying criteria additional to the tests. These, and perhaps other possibilities, were legitimate avenues for the Union to pursue. To be sure, the Company's interest is to decide as quickly and inexpensively as possible who should be promoted to more advanced positions, and to that end, to rely entirely on giving tests and abide by the results. On the other hand, the proper concern of the Union, as representative of the employees, is to insure that each employee will have every opportunity to advance as far as his unique capabilities justify, and that, when promotions are made, each employee who so desires will be given the chance to prove that he is capable of doing the more advanced job.

The fact that the test scores of employees on the job correlate with supervisory ratings of their job

performance (but see Pet. App. 23a; A. 232, 239-240) does not establish a casual relationship, and therefore does not end the inquiry.[14] An employee with a low score on the test will not necessarily be incapable of performing the job well. Indeed, petitioner acknowledges (Pet. Br. 11-12) that those scoring less than 10.3 on its test battery had a 20 percent chance of becoming successful instrument men. Moreover, the background or experience of certain applicants may be such that the test questions do not fairly measure their aptitude.[15]

[14] See Hoel, *Elementary Statistics* 192-193 (3d ed., 1971):

> The interpretation of a correlation coefficient as a measure of the strength of the linear relationship between two variables is a purely mathematical interpretation and is completely devoid of any cause and effect implications. The fact that two variables tend to increase or decrease together does not imply that one has any direct or indirect effect on the other. Both may be influenced by other variables in such a manner as to give rise to a strong mathematical relationship. For example, over a period of years the correlation coefficient between teachers' salaries and the consumption of liquor turned out to be .98. During this period of time there was a steady rise in wages and salaries of all types and a general upward trend of good times. Under such conditions, teachers' salaries would also increase. Moreover, the general upward trend in wages and buying power, together with the increase in population, would be reflected in increased total purchases of liquor. Thus the high correlation merely reflects the common effect of the upward trend on the two variables. Correlation coefficients must be handled with care if they are to be given sensible information concerning relationships between pairs of variables. Success with them requires familiarity with the field of application as well as with the mathematical properties.

The relevancy of the requested materials in exploring these matters is obvious. The test battery would enable the Union to determine the extent to which questions were asked which called for specialized knowledge beyond the requirements of the instrument man job, or which did not fairly measure the aptitude of certain classes of applicants.[16] The employees' ac-

[15] See *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87, 117-118 (E.D. Mich.), reversed and remanded on other grounds *sub nom. Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F. 2d 301 (C.A. 6), vacated and remanded, 431 U.S. 951.

[16] For example, the "Vocabulary" section of the sample EPSAT provided by the Company asked for definitions of words like "homage," "diabolic," "imbue," and "droll" (A. 381). The Union could show that the instrument man job does not require such knowledge, or that knowledge of such terms was foreign to the cultural background of some of the applicants. Similarly, Lawrence Kanous, the Company's Director of Employee Training, testified that, although the posted requirement for the instrument man job specified "satisfactory credits for two years of high school math," the mathematics section of the EPSAT was designed to measure a "facility with mathematics at a higher level * * * than is typical of a high school course" (A. 199, 200). The Union could show that certain mathematics questions exceeded the requirements of the instrument man job (see A. 27).

Contrary to petitioner's contention (Pet. Br. 45-46), the Union would not be attempting to show that questions unrelated to the job impaired the validity of the test as a selector of those likely to do well in the job. Rather, it would be showing that, despite its statistical validity, those questions ruled

tual test papers and scores would enable the Union to determine whether, and the extent to which, an employee scored low because he missed those kinds of questions. Finally, the Union needed to link the employees' names with their test scores, not only to verify the accuracy of the scores, but to determine whether a particular employee was entitled to be considered for the job despite a low score on the test.[17]

Enough has been said on the question of relevance. We turn to the basic issue in the case: whether, although the test materials sought by the Union were relevant and useful in connection with the pending grievances, the Board exceeded its remedial authority under Section 10(c) of the Act, 29 U.S.C. 160(c), in

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out particular applicants who were nonetheless capable of performing the job.

The sample tests furnished by the Company (see Pet. Br. 44) were not an adequate substitute for the actual test battery because they did not show the questions which were actually asked the employees. The actual tests could have contained questions which were even more objectionable than those in the sample tests; moreover, the proportion of such questions could have been greater than in the sample tests.

[17] For example, if employee Smith scored low because he missed questions which were not related to the instrument man job, the Union—if it could establish that he had done well in jobs similar to the instrument man job—would be able to argue to the arbitrator that Smith was within the category of those who would do well in the job despite a low test score. Similarly, if the Union discovered that employee Jones scored very high, but that his on-the-job performance left much to be desired, that fact would also be relevant to a determination of the fairness of excluding Smith from consideration for the instrument man job solely on the basis of the test results.

requiring the Company to turn the materials over directly to the Union, rather than to a Union-hired psychologist.

B. The Board's order as enforced by the court of appeals contains protective provisions which are adequate to safeguard the security of the test materials

The Board ordered that the test materials be given directly to the Union, rather than to a Union-selected psychologist, because, in its judgment, the Union was entitled to decide for itself "whether the assistance or expertise of a psychologist is required" (Pet. App. 15a). The Board was not unreasonable in so concluding, since the Union was not challenging the validity of the tests but merely attempting to show that they were "unfair" to particular applicants—a determination calling for practical knowledge of the job.[18] Moreover, the services of a professional psychologist are costly and to force the Union to incur this added expense, if unnecessary for the intelligent processing of the grievance, could well deter the Union from pursuing a grievance which it believed to be meritorious.

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[18] Since the Union was seeking to demonstrate that an employee's failure to answer certain questions correctly should not preclude further consideration for promotion, the basic issue was the relevance of specific knowledge to the job. A psychologist would not necessarily be well-suited to assist in making this judgment. An intelligent layman, familiar with the requirements of the job, would be in as good, or better, position to do so. And, if the Union determined that a professional consultant could be useful, the hiring of an engineer or other person experienced in the mechanics of power plant

1. Petitioner argues that giving the test materials to the Union directly would destroy the future validity of the tests. The premise is that "disclosure of the test materials to 'the Union' naturally leads to disclosure and, therefore, foreknowledge of the actual items on the tests by some or all of the persons who will take the tests in the future * * *" (Pet. Br. 31). However, as the court of appeals correctly observed (Pet. App. 6a-7a), the "answer to Detroit Edison's concern about the possibility of the tests falling into unauthorized hands is found in the Board's adoption of the administrative law judge's limitations on use of the materials by the union." [19]

Recognizing the Company's concern "with protecting the tests from such disclosure as would destroy their future utilization" (Pet. App. 15a), the Board, although ordering the Company to supply copies of the tests and the actual test papers to the Union directly, adopted all of the administrative judge's restrictions on the Union's use of those materials. Thus, while the Union is accorded "the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances," it is directed

operation might well be a more productive expenditure of Union funds.

[19] The administrative judge, whose order petitioner asked the Board to adopt, based his recommendation that the test materials be turned over to a Union-hired psychologist, not on "security" grounds, but on his view, with which the Board disagreed, that the Union would need such professional assistance (Pet. App. 54a).

"not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests." (Pet App. 55a-56a.) And, "[a]fter the conclusion of the arbitration proceeding," the Union is required to return "all copies of the battery of tests" to the Company (Pet. App. 56a). Moreover, the court of appeals, in enforcing the Board's order, stated that the "restrictions on use of the materials and obligation to return them to Detroit Edison are part of the decision and order which we enforce"; "[v]iolation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board" (Pet. App. 7a).

In short, under the Board's decision and order as enforced by the court of appeals, the Union is barred from taking any action that might cause the tests to fall into the hands of employees who have taken or are likely to take the tests,[20] and it would be subject

[20] The Second Circuit's decision in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420 (Pet. Br. 35-36), is, therefore, clearly distinguishable. In *Kirkland*, the court reversed a district court ruling ordering that a new examination replacing the old, discriminatory test be submitted to the plaintiffs for review, where the plaintiffs themselves would subsequently be taking the new test; the case was remanded to the district judge with instructions to take "steps * * * to insure confidentiality." *Id.* at 427. In the instant case, on the other hand, the order did not require the tests to be submitted to potential test-takers, and indeed

to a contempt citation were it to ignore those restrictions.[21] The federal courts have fashioned similar protective provisions in ordering discovery of sensitive information under Fed.R.Civ.P. 26(c), relying

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made provision to insure that such people did not have access to the tests.

[21] Although the restrictions on the Union's use of the test materials were set forth in the Board's decision (Pet. App. 15a-16a), they were incorporated by reference into the order, which directed the Company to submit the requested test materials to the Union "in accordance with this Decision" (Pet. App. 16a). The Union, as charging party, was a party to the Board proceeding (Pet. App. 14a, 18a), and was aware of, and indeed actively participated in the litigation over, those restrictions. Moreover, if it disagreed with the restrictions which the Board ultimately imposed, it could have sought court review of the Board's decision in that respect. See Section 10(f), 29 U.S.C. 160(f). In these circumstances, the Union, by accepting materials from the Company pursuant to the Board's order as enforced by the court of appeals, would be bound by the restrictions on use of the materials imposed by that order and subject to a contempt citation if it violated them. See *Walker* v. *City of Birmingham*, 388 U.S. 307, 312, 317-319; *United States* v. *Hall*, 472 F. 2d 261, 265-267 (C.A. 5); *Bethlehem Mines Corp.* v. *United Mine Workers*, 476 F. 2d 860, 864, 866-867 (C.A. 3). Cf. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 171-178.

The cases relied upon by *amicus* Chamber of Commerce of the United States (Chamber Br. 13) for its assertion that the Union could not be found in contempt of the instant order are distinguishable. In those cases the courts indicated that the contempt remedy could not be invoked against nonparties who "act independently [of the parties] and whose rights have not been adjudged according to law." *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 437. Here, on the other hand, the Union's rights were adjudged by the court below, and it is subject to the court's order.

on the contempt sanction to deter violations of such provisions.

Thus, in *Rosenblatt* v. *Northwest Airlines, Inc.*, 54 F.R.D. 21, 23-24 (S.D. N.Y.), plaintiffs, in a suit alleging deceptive securities practices, were permitted discovery of confidential bank records with the following limitation:

> Data obtained through the within discovery is to be used only for the preparation and actual prosecution of this action. Accordingly, plaintiffs, their counsel, personnel, agents, experts, and others similarly situated are not to reveal the contents of the documents or use the information contained therein for any other purpose.

Similarly, in *United States* v. *American Optical Co.*, 39 F.R.D. 580, 587 (N.D. Cal.), defendants, in an antitrust suit, were permitted to subpoena confidential documents of a non-party competitor subject to the following limitation:

> The order will * * * direct defendants' counsel to limit their disclosure of the documents to those of defendants' personnel with whom it may be necessary for counsel to confer in order to prepare the defense to this action, and will direct such counsel and personnel not to make copies, or reveal the contents of the documents, or use the information contained therein, for any purpose other than for the preparation of the defense to this action.

The court added (*id.* at 587 n. 10) that it could not properly assume that the defendants "will not comply

in good faith with the conditions of any protective ordered entered by this Court." [22]

So here. The Company assumes that the Union has indicated a preference for promotion by seniority alone and that it therefore has a "motive to discredit testing as a selection device" and would be likely to use the "ammunition" furnished it "to destroy test validity" (Pet. Br. 41-42). Proceeding from this assumption, the Company asserts that adherence to the copying and dissemination restrictions "would be most difficult, if not impossible, for a company to enforce and police once it has given a union the test materials as required by the Board's order. At that

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[22] See also *Julius M. Ames Co.* v. *Bostitch, Inc.*, 235 F. Supp. 856, 857 (S.D. N.Y.); *Babcock & Wilcox Co.* v. *Public Service Co. of Indiana*, 22 F.R. Serv. 2d 340, 341-342 (S.D. Ind.); *United States* v. *Lever Brothers Co.*, 193 F. Supp. 254, 258 (S.D. N.Y.), certiorari denied, 371 U.S. 932; *Textured Yarn Co.* v. *Burkart-Shier Chemical Co.*, 41 F.R.D. 158, 160 (E.D. Tenn.); *Milsen Co.* v. *Southland Corp.*, 15 F.R. Serv. 2d 1268, 1269 (N.D. Ill.).

Cf. *International Union of Operating Engineers, Local No. 49* v. *City of Minneapolis*, 305 Minn. 364, 233 N W. 2d 748. There, the Supreme Court of Minnesota sustained a "trial court's decision ordering [the city] to divulge the questions and answer key [to a test given for the purpose of determining employee promotions] but direct[ed] that [the union] respect the need for the confidentiality of this information." 305 Minn. at 371, 233 N.W. 2d at 753. The court explained that "the public interest in protecting the confidentiality of civil service examinations can be adequately served if [the union] is directed to refrain from disclosing the requested information to applicants who will take this examination in the future." *Ibid.*

point it has lost *control* over the materials, and 'test security' in accordance with Standard I5 of the APA Standards * * * and the EEOC Guidelines incorporating those standards has been breached" (Pet. Br. 39-40). These objections are not soundly based.

In the first place, it is impermissible to presume that the Union will disregard the terms of the order enforced by the court of appeals. As this Court recognized in *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, 676, "[w]e cannot assume that a union conducts its operations in violation of law * * *." Cf. *Whalen* v. *Roe*, 429 U.S. 589, 601-602. There are, moreover, strong reasons, apart from legal sanctions, which induce the Union to conform to the restrictions of that order. Here, the Union's central function is to represent the employees in an ongoing relationship with the Company. Any violation of the restrictions of the order would severely jeopardize the Union's ability effectively to represent the employees in the future. Such bad faith action by the Union might justify the Company in refusing later requests for similar information and could adversely affect the Union's general relationship with the employer. The Union has represented units of petitioner's employees for 35 years (Pet. App. 19a). As the Board observed in a similar situation, *Fawcett Printing Corp.*, 201 NLRB 964, 974, "the parties' long-standing bargaining relationship * * * increases the likelihood that the [Union] would honor a request by [the Company] to keep" the materials confiden-

tial.[23] In sum, the Union's own interests lie in maintaining, not breaching, the security of the tests.

Of course, the disclosure of confidential or other sensitive material under a discovery protective order always involves some danger that the order may be violated[24] and that the violation will go undetected. But that risk must nonetheless be accepted, if, on balance, the interest served by disclosure of the informa-

[23] Moreover, the Union has a significant interest in fairly representing all employees who are members of units for which it is bargaining agent. Since leakage of the tests to some employees would jeopardize the interests of others, and even leakage of the tests to all employees would jeopardize less senior, but better qualified, workers, a violation of the Board's order could open the Union to suits and charges alleging a breach of its duty of fair representation. See *Vaca* v. *Sipes*, 386 U.S. 171. A union which breaches an "agreement" under which information was provided by the employer would probably also violate its duty to bargain in good faith, imposed by Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3). See *New York District Council No. 9, Brotherhood of Painters* v. *National Labor Relations Board*, 453 F. 2d 783 (C.A. 2), certiorari denied, 405 U.S. 988; *National Labor Relations Board* v. *Communications Workers Local 1170*, 474 F. 2d 778 (C.A. 2). Finally, a union which acts in disregard of the employees' legitimate interests by favoring some over others and destroying a good-faith relationship with the employer runs a substantial risk of being decertified or replaced by the employees as their bargaining agent.

[24] The fact that the Union read sample test questions into the record of the arbitration proceeding (Pet. Br. 41) does not indicate that it would do so with respect to the actual test materials. At the time of that proceeding, the Union was not under the restrictions on use of the materials which are now imposed by the Board's order as enforced by the court of appeals. Moreover, there is no indication that the sample test questions were not available to the general public.

tion outweighs the harm that results from the risk of violation of the protective order. In this case, balancing the right of the employees to be adequately represented by their union representative in respect of grievances against the possibility that the union will disclose the test materials to the employees and that this violation of the Board's order will go undetected, we submit the Board reasonably concluded that the employees' interests should prevail.[25] "Here as in

[25] We are not insensitive to the strong public policy in favor of preventing the compromise of employment tests. Indeed, the United States Civil Service Commission is a major developer and user of employment tests, as are numerous other federal, state, county and local government agencies. There are 581 test forms in the Commission's active test catalogue, developed over many years and involving the commitment of large resources. Governmental recruitment would be seriously disrupted and public confidence eroded if the integrity of the tests were comprised. For those reasons, the Commission has been zealous to guard against undue disclosure and has successfully contended for protective orders which limit exposure of the tests to attorneys and professional psychologists with restrictions on copying or disseminating test materials.

Nevertheless, we have no hesitancy in defending the present decision—where the validity of the tests was not challenged and the tests were relevant to the employee grievances pursuant to the terms of the collective bargaining agreement—because disclosure to the Union itself serves a legitimate function without unduly impinging on privacy interests of the employees, because the Union's institutional interests militate against improper disclosure of the tests and because the Board's order includes specific protective provisions which, in the circumstances of this case, can reasonably be expected to safeguard the integrity of the tests. It is, moreover, appropriate to defer, in this context, to the considered judgment of the Board, charged by Congress with special responsibility for effectuating labor policy.

many other contexts of labor policy, '[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review'." *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152, decided June 22, 1978, slip op. 17.

2. Other challenges to the Board's disclosure order may be answered briefly.

a. It is suggested that turning over the test materials to the Union would violate Standard I5 of the *Standards for Educational and Psychological Tests and Manuals*, published by the American Psychological Association (hereinafter "APA Standards") (1974), and referred to in the Guidelines issued by the Equal Employment Opportunity Commission to implement Title VII of the Civil Rights Act of 1964.[26] The con-

[26] Section 703(h) of that Act, 78 Stat. 257, 42 U.S.C. 2000e-2(h), permits an employer "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." Pursuant to Section 703(h), the EEOC has developed "Guidelines on Employee Selection Procedures, which state that "properly validated and standardized employee selection procedures can significantly contribute to the implementation of non-discriminatory personnel policies * * *." 29 C.F.R. 1607.1 (Pet. App. 88a-89a). The Guidelines further state that evidence in support of a test's validity must be based "on studies employing generally accepted procedures for determining criterion-related validity, such as those described in 'Standards for Educational and Psychological Tests and Manuals' published by American Psychological Association * * *." 29 C.F.R. 1607.5 (Pet. App. 92a-93a).

tention makes much of little. Standard I5 merely states that: "The test user shares with the test developer or distributor a responsibility for maintaining test security." There is nothing in the Standard which suggests that a test user would fail in his responsibility to maintain test security by turning over test materials pursuant to a court order which contains provisions designed to keep the tests secure.

The argument premised on Standard J2 (Pet. Br. 34-35) fares no better. That standard provides that test scores should "ordinarily be reported only to people who are qualified to interpret them" and that, if reported, the scores "should be accompanied by explanations." There is no prohibition against reporting scores to non-psychologists, as long as the scores are accompanied by explanations. The Board's order, of course, does not bar petitioner from providing such explanations. The "Comment" to J2 recognizes that it is an "unanswered" question whether untrained people should be given test scores, or only interpretations, and also notes that there is no definitive answer as to who within an organization should have access to scores, except that "curious peers" should not. The Union, as the duly certified representative of all the employee applicants, is certainly not a "curious peer" in processing properly filed grievances under the collective bargaining agreement. Moreover, Standard J2.1 provides that an "individual tested (or

his *agent* or guardian) has the right to know his score and the interpretations made" (emphasis supplied). The Union, as the employees' bargaining agent, falls within this category.[27]

b. The Company further complains that the Board's order requires that the tests and test scores be divulged to "the Union," without specifying whether this means "the individuals who comprise the executive officers of the Union, its Executive Board, its grievance committee or * * * the entire membership" (Pet. Br. 40). The point is frivolous. The materials were requested in connection with the processing of grievances and the order specifically precludes the Union from disclosing them to employees who have taken or will take the tests; accordingly, "the Union" clearly does not mean the union membership generally, but rather those officials of the Union charged with responsibility for processing grievances under the collective bargaining agreement.

Nor is there any reason to fear that, if this group included some members of the bargaining unit, the knowledge "gained by these individuals pursuant to the Court enforced Board Order could be used by them to gain an unfair competitive edge on others not privy

[27] Nor does the Board's order violate the provision of the EEOC Guidelines that: "Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores." 29 C.F.R. 1607.5(b)(2) (Pet. App. 94a). As shown, the protective provisions of the Board's order as enforced by the court of appeals are a proper safeguard to protect the security of the test materials.

to the test or test scores" (Pet. Br. 40). Nothing in the Board's order would preclude the Company from requiring the Union to name the employees on the grievance committee to whom it proposed to show the test materials and from excluding those employees from the test-taking pool in the future.

c. Finally, the Company contends that, even if the Union were found to violate the restrictions imposed by the Board and the court of appeals, a contempt remedy "is speculative at best." It adds that, even if the Union were liable in contempt, "there is no adequate remedy for the violation, since the tests will have been hopelessly invalidated and it would take years to validate a new test" (Pet. Br. 42). To be sure, only the Board may institute contempt proceedings. But there is no reason to assume that it would fail to do so if it learned that the Union had violated the restrictions imposed by the Board and the court. One must assume that the Board is anxious to vindicate its own orders and to assure that court decrees enforcing them are not flouted.[28]

Moreover, the efficacy of the contempt sanction is properly measured by the deterrent effect which the availability of the sanction produces. Whether or not

[28] As shown (n. 21, *supra*), the Union may be held in contempt for violating the court's order even though it was not a party to the proceedings in the court of appeals. Since willfulness is not required to establish civil contempt (see *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 197), petitioner is mistaken in suggesting that "inadvertent disclosure would be completely beyond the contempt powers of the courts" (Pet. Br. 42).

a large monetary fine would fully compensate the Company if the test security were breached, the threat of having to pay such a fine is likely to deter the Union from taking action that would invalidate the tests.

C. Disclosure of the test scores and test papers linked with the names of those tested does not impair the legitimate interests of employees and psychologists

1. Petitioner contends (Pet. Br. 52) that it should not be required to disclose the scores made by specific applicants because it promised the applicants that the scores would be kept confidential. We answer that the Union cannot be deprived of information which is relevant to the discharge of its responsibility to represent fairly all of the unit employees merely because the Company has unilaterally decided to assure employees that the information would be kept confidential. See *General Electric Co.* v. *National Labor Relations Board*, 466 F. 2d 1177, 1185 (C.A. 6); *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 71 (C.A. 3). Nor can the Company condition the release of such information upon the Union's obtaining the consent of the employees involved (see Pet. Br. 44). The Union having been selected by the employees as their bargaining agent, Section 9(a) of the Act, 29 U.S.C. 159(a), empowers it to decide, without obtaining individual employee consents, whether certain information is needed for the adequate performance of its representative function. See *Electric Auto-Lite Co.*, 89 NLRB

1192, 1199-1200; *Boston Herald-Traveler Corp.*, 110 NLRB 2097, 2100, enforced, 223 F.2d 58 (C.A. 1). There is, in any event, no indication that any person tested has objected to disclosure of his score.

No doubt, confidential information about employees should be withheld where disclosure would impose a "clear and present danger" of harassment and violence, *United Aircraft Corp.* v. *National Labor Relations Board*, 434 F. 2d 1198, 1207 (C.A. 2), certiorari denied, 401 U.S. 993. But petitioner produced no probative evidence of such a danger here.[29] Indeed, since the Union's position as bargaining representative depends upon retaining the confidence of the employees, it has a strong incentive to guard against dissemination of any information, such as employee names and scores, which could possibly lead to embarrassment or harassment of employees.

2. Similarly without merit is the American Psychological Association's contention (APA Br. 9-12) that disclosure of employee-linked scores and test papers ignores the employee's interest in a confidential relationship with the psychologist. Contrary to the Association's view, this case does not involve "a testing or therapeutic situation [where] a psychologist's clients may be called upon to reveal personal

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[29] The record merely contains the vague assertion of Company psychologist Roskind that "many, many years ago * * * several individuals whose test scores were known to themselves and other individuals that worked with them, were harassed so much and called stupid and dummy and so on, to the point where they actually left * * *" (A. 84).

thoughts, experiences, and memories" (*id.* at 10). The tests in question are for the most part no more than tests of acquired knowledge (see *supra*, n.4, n.16). They are not psychological profiles; nor do they involve any counseling relationship between the Company psychologists and the employees. Indeed, so far as the tests are concerned, the only contact between the Company psychologists and the employees was the actual administration of the test battery. After the tests were taken by the employee-applicants, the "relationship" ceased; the psychologists graded the tests and told the Company who "passed" and who did not. In these circumstances, the Association's suggestion (APA Br. 11) that the test-taking here was a "client communication[] with a psychologist," within the purview of various state laws on testimonial privilege, borders on the frivolous.[30]

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[30] APA also contends (APA Br. 12-17) that the Board's order violates privacy interests of the employees. However, no employee has raised any such objection. Moreover, as this Court pointed out in *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767, in rejecting an employer's contention that disclosure of employees' names and addresses to unions conducting organizing campaigns would violate their privacy interests and subject them to harassment: "The disclosure requirement furthers [the objectives of the Act] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present." And see *Whalen* v. *Roe*, *supra*, 429 U.S. at 602. Similarly here, the Board has reasonably concluded that the asserted interest in employee privacy is outweighed by the Union's legitimate interest in disclosure to it.

3. Finally, there is no merit in the Association's contention (APA Br. 17-23) that its *Ethical Standards of Psychologists* (1977 rev.), and state law (which incorporates the Standards), would be breached by compliance with the Board's order to provide the Union with the test scores of the applicants. While Principle 5 of the *Ethical Standards* (formerly Principle 6, A. 431-432) imposes an obligation on the psychologist to safeguard "information about an individual that has been obtained * * * in the course of * * * teaching, practice, or investigation," subsection (b) of the Principle provides that "evaluative data concerning * * * employees" may be discussed "with persons clearly concerned with the case" if "only data germane to the purposes of the evaluation" is presented and "every effort [has been] made to avoid undue invasion of privacy." Since the Union is a party "clearly concerned with the case," and the employees' test scores and papers are "data germane to the purposes of the evaluation," the release of such information to the Union, under the safeguards of the Board's order, would not appear to violate subsection (b) of Principle 5.

Nor is there any obstacle in subsection (c) of Principle 8 (paralleling former Principle 14, A. 438) which provides that psychologists should "strive to insure that the test results and their interpretation are not misused by others" (APA Br. 19). The preceding part of that subsection merely states that, "[i]n reporting test results, psychologists [should] indicate any reservations regarding validity or reliability resulting from testing circumstances or in-

appropriateness of the test norms for the person tested." Nothing in the Board's order would preclude the Company psychologists from giving such explanations with respect to the employee scores which are furnished to the Union.

The Association's contention that compliance with the Board's order would result in a breach of the APA *Ethical Standards* rests, at bottom, on the assumption that the Union will inevitably disclose the test scores to the Union membership generally (APA Br. 19, n. 28). As we have said, wholly apart from the restrictions of the Board's order,[31] there is good reason why the Union would not do so. Nor does the "Union's refusal to place the scores in the hands of a psychologist qualified to interpret them" show that "the Union may indeed intend to use the scores in a manner harmful to those tested" (APA Br. 19-20). Since the Union was not attacking the validity of the tests, a trained psychologist was not necessarily required (see *supra*, pp. 18, 23-24).

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[31] Contrary to APA's view (APA Br. 20, n. 30), the restrictions of the Board's order do not apply only to the test battery. Since the administrative judge, whose restrictions on use of the test materials were adopted by the Board, initially directed the Company "to supply copies of the battery of tests * * *, including the actual test papers of the applicants (necessary to check the accuracy of the scoring of the tests) * * *" (Pet. App. 55a), it is reasonable to construe his subsequent references to "the tests" as encompassing both the test battery and the "actual test papers of the applicants." To the extent that the employees' test scores appear on their test papers (see A. 89, 379, 446), they would thus be covered by the Board's protective order.

In any event, the APA *Ethical Standards*, and state law, both must give way to the paramount federal law.[32] See *National Society of Professional Engineers* v. *United States*, No. 76-1767, decided April 25, 1978; *Nash* v. *Florida Industrial Commission*, 389 U.S. 235.

We conclude that the Board's remedial power, conferred by Section 10(c) of the Act, 29 U.S.C. 160(c), "is a broad discretionary one, subject to limited judicial review," *Fiberboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 216, and that its order should not be disturbed unless it can be shown "that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540. In our submission, the Board's ruling does not overstep the limits of its authority.

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[32] Indeed, APA acknowledges (APA Br. 22, n. 33) that it "does not assert that the State of Michigan or the APA would discipline Dr. Roskind, Detroit Edison's industrial psychologist, for disclosing the test scores or papers pursuant to the court's order."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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